STATE OF MICHIGAN

COURT OF APPEALS

PHILIP M. KELLER,

Plaintiff-Appellant,

v

CITY OF GRAND RAPIDS,

Defendant-Appellee.

UNPUBLISHED
August 7, 2001

No. 223083
Kent Circuit Court
LC No. 95-001019-CL

Before: Saad, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant's motion for judgment notwithstanding the judgment or in the alternative for a new trial in this action in which plaintiff alleged constructive discharge and violation of the Whistleblower's Protection Act.[1] We reverse.

Plaintiff contends that the evidence was sufficient to support the jury's finding that plaintiff was harassed out of his job by his supervisor, Ralph Gould, and that Gould's harassment was motivated at least in part by plaintiff's filing of a report with the police department regarding defendant's failure to comply with and enforce the prohibition of smoking in public buildings as provided by the Michigan Clean Indoor Air Act, MCL 333.12605; MSA 14.15(12603). According to plaintiff, defendant constructively discharged plaintiff and violated the Whistleblower's Protection Act (WPA), MCL 15.361 *et seq*; MSA 17.428(1) *et seq*., by discriminating against plaintiff regarding the conditions of his employment.

We review a trial court's decision on a motion for judgment notwithstanding the verdict de novo. In *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255. 260-261; 617 NW2d 777 (2000), this Court recently held:

> In reviewing a decision on a motion for JNOV, this Court must view the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). If reasonable jurors could have honestly reached different

[1] Following a nine-day jury trial, plaintiff was awarded $481,008.09 in damages.

> conclusions, the jury verdict must stand. *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995).

The WPA was enacted in 1981 and encourages employees to assist in law enforcement and protects those employees who engage in whistleblowing activities. *Dolan v Continental Airlines*, 454 Mich 373, 378; 563 NW2d 23 (1997). It does so with an eye towards promoting public health and safety. *Id.* To establish a prima facie case under the WPA, a plaintiff must prove that he or she reported or was about to report a violation or a suspected violation of a law, regulation, or rule to a public body. *Id.* at 379. Remedial statutes such as the WPA are to be liberally construed in favor of the persons intended to be benefited. *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 77; 503 NW2d 645 (1993).

Section 2 of the WPA provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee . . . reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body . . . . [MCL 15.362; MSA 17.428(2).]

To establish a prima facie violation of the WPA, a plaintiff must show (1) that the plaintiff was engaged in a protected activity as defined by the WPA, (2), that the plaintiff was discharged, and (3) a causal connection existed between the protected activity and the discharge. *Henry v Detroit*, 234 Mich App 405, 409; 594 NW2d 107 (1999).

In an earlier appeal in this case, this Court held that plaintiff had engaged in protected activity when he filed the police report regarding the lack of enforcement of the no-smoking policy.[2] Whether plaintiff has satisfied the first prong of the prima facie case is not an issue in this appeal.

This appeal involves whether plaintiff produced sufficient evidence at trial for a reasonable jury to conclude that prongs two and three of the test had been satisfied, i.e. that he had been constructively discharged and that a causal connection existed between the protected activity and the discharge. In reviewing the record in-depth, focusing on the various incidents that plaintiff contends led to his constructive discharge, we keep the demanding JNOV standard in mind. Thus, we must view the testimony and all legitimate inferences to be drawn therefrom in favor of plaintiff, and if reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Morinelli, supra*, at 260-261.

In *Roulston v Tendercare, Inc*, 239 Mich App 270, 280-281; 608 NW2d 525 (2000), this Court explained the "shifting burdens" framework within which a retaliatory discharge claim under the WPA is analyzed:

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[2] *Keller v Grand Rapids*, unpublished opinion per curiam of the Court of Appeals, issued March 24, 1998 (Docket No. 199285),

> Defendants also argue that, even if there is a link between plaintiff's whistleblowing and her discharge, it is insignificant in light of the articulated reasons for plaintiff's firing. This Court has found that the WPA bears substantial similarities to Michigan civil rights statutes and that actions under the WPA are analyzed using the "shifting burdens" framework utilized in retaliatory discharge actions under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*. *Anzaldua v Band*, 216 Mich App 561, 580; 550 NW2d 544 (1996). Thus, the plaintiff bears the initial burden of establishing a prima facie case of retaliatory discharge. *Hopkins v Midland*, 158 Mich App 361, 378; 404 NW2d 744 (1987). If the plaintiff succeeds, the burden shifts to the defendant to articulate a legitimate business reason for the discharge. *Id*. If the defendant produces evidence establishing the existence of a legitimate reason for the discharge, the plaintiff must have an opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for the discharge. *Id*.
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> Once the pretext question is reached, the question of mixed motive, i.e., retaliation plus a legitimate business reason, must be considered. *Melchi v Burns Int'l Security Services, Inc*, 597 F Supp 575, 583 (ED Mich, 1984). The *Melchi* court offered four standards for proving pretext in a retaliatory discharge case: (1) whether participation in the protected activity played any part in the discharge, no matter how remote, (2) whether the plaintiff's protected activity was a substantial factor in the discharge, (3) whether the plaintiff's protected activity was the principal, but not sole, reason for the discharge, or (4) whether the discharge would have occurred had there been no protected activity. A plaintiff can prove pretext either directly by persuading the court that a retaliatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. *Hopkins, supra* at 380.

After a thorough review of the record, we conclude that plaintiff produced sufficient evidence for a reasonable jury to conclude that a prima facie case of retaliatory discharge had been met. The burden then shifted to defendant to articulate a legitimate business reason for, in this case, the allegedly harassing events that led to the constructive discharge. We believe that defendant failed to carry that burden, and, even construing defendant's evidence as articulated "legitimate business" reasons, we believe that plaintiff provided sufficient evidence for a reasonable jury to conclude that those reasons were merely a pretext for the harassing events that led to the discharge.

Defendant asserts that Gould was "authorized" to take the actions he did. The fact that Gould may have been authorized to take part in evaluations, to administer discipline when appropriate, and to assign supplementary tasks to emergency communications operators, such as the task of updating manuals, does not explain Gould's specific actions toward plaintiff.

Defendant did not attempt to establish at trial that plaintiff was treated similarly to other employees, nor did defendant explain why Gould deviated from ordinary procedures, as testified to by defendant's own immediate supervisors and other employees, in the course of dealing with plaintiff. Specifically, we fail to see any explanation in the record for why plaintiff was

disciplined for allegedly failing to sign out to attend a mandatory physical examination when other similarly situated employees were not; nor do we see any explanation in the record for why plaintiff was "written up" for failing to initial a posted employee bulletin when the procedure utilized (an incident notice or "OINK") was typically reserved for "severe violations" of employment, such as when an employee failed to report to work or reported to work drunk. This is particularly true given defendant's admitted failure to discipline employees who, according to several witnesses at trial, smoked in blatant disregard of the no-smoking policy.

We also fail to find any explanation by defendant regarding the assignment given to plaintiff on the last day of his employment, when he was the primary call taker in an undisputedly stressful position, when the call taker in his position was not ordinarily assigned that sort of task, and, most significantly, against the express recommendation of plaintiff's immediate supervisor who suggested that the task should be assigned to someone else. A reasonable juror could have concluded that when plaintiff was then disciplined for failing to perform the task, Gould was intentionally harassing plaintiff.

These incidents, taken together with the other alleged incidents of harassment that we will not detail here, and viewed in a light most favorable to plaintiff, suggest that defendant's general claim of "authority," without more, was a mere pretext for Gould's behavior. We also believe that when Gould's actions are considered together, a reasonable jury could conclude that the events rise to the level of harassment such that a reasonable person in plaintiff's position would have resigned. *Jacobson v Parda Federal Credit Union*, 457 Mich 318, 326; 577 NW2d 881 (1998).

Plaintiff also argues that the trial court abused its discretion by granting defendant's alternative motion for a new trial. In deciding a motion for a new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997). This Court must determine whether the trial court abused its discretion in ruling on a motion for new trial. *Id.* Substantial deference is given to the trial court's conclusion that a verdict was not against the great weight of the evidence. *Id.*

A court's determination that a verdict *is* against the great weight of the evidence is given *less* deference, however, in order to insure that the court did not invade the jury's province. *Arrington v Detroit Osteopathic Hospital (On Remand)*, 196 Mich App 544, 560; 493 NW2d 492 (1992). In either event, this Court must analyze the record on appeal in detail. *Id.*

Here, the court made no specific findings regarding its decision to grant a new trial; thus, the record is lacking in this regard.[3]

A new trial may be granted, on some or all of the issues, if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). Such motions are not favored, however, and

[3] The court simply stated that, "In the alternative, the Court finds that the verdict in this case is against the great weight of the evidence, and, if necessary, we'll retry the case."

should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich App 625, 639, 642; 576 NW2d 129 (1998). The jury's verdict should not be set aside if there is competent evidence to support it; the trial court cannot substitute its judgment for that of the factfinder. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

We find that there was competent evidence to support the jury's verdict and that in granting the new trial the court simply substituted its judgment for that of the jury. The issue of whether there was competent evidence to support the verdict usually involves matters of credibility or circumstantial evidence. *In re Robinson*, 180 Mich App 454, 463; 447 NW2d 765 (1989). If there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder. *Rossien v Berry*, 305 Mich 693, 701; 9 NW2d 895 (1943).

Plaintiff's case depended largely upon credibility and involved a great deal of conflicting evidence. For example, plaintiff's testimony regarding a meeting in the kitchen with Gould and the threats Gould made directly conflicted with Gould's testimony that it never happened. Plaintiff offered his own testimony and the testimony of defendant's own supervisors to show that he was singled out and treated more harshly for minor violations than others; for example, when he failed to initial a posted bulletin or to sign out for physical, he received an OINK, normally reserved for "serious violations" or he was "written up" while others were not, despite the fact that the bulk of the testimony indicated that plaintiff's fellow employees and supervisors blatantly violated the no-smoking policy. Defendant simply claimed that Gould had the authority to do what he did. There was sufficient evidence to support the jury's verdict.

Furthermore, because defendant failed to present legitimate business reasons for Gould's specific treatment of plaintiff, a jury could reasonably conclude that Gould's treatment of plaintiff was retaliatory and was motivated at least partly by plaintiff's report of the no-smoking violations, and could also conclude that plaintiff's working conditions were made so intolerable by the harassment that he was justified in leaving his position.

Based on our review of the record, we conclude that there was competent evidence to support the jury's verdict and that the court abused its discretion by granting the new trial.

Accordingly, we reverse the order granting defendant's motion for JNOV or new trial and reinstate the jury verdict.

Reversed.

/s/ E. Thomas Fitzgerald